BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARYL McLINN	)	
Claimant	)	
VS.	)	
	)	Docket No. 173,709
COMMERCIAL SOUND COMPANY	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin on April 3, 1997. The Appeals Board heard oral argument September 24, 1997.

APPEARANCES

Kip A. Kubin of Overland Park, Kansas, appeared on behalf of the respondent and its insurance carrier. Paul D. Post of Topeka, Kansas, appeared on behalf of the claimant.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

In its application for review, respondent described the issues as follows:

1. The amount of compensation due and owing to the Claimant.
2. Whether Claimant is entitled to a 'work disability' and the nature and extent of that disability.

In its brief and at the time of oral argument, respondent also disputed the award of temporary total disability benefits during the period of the vocational rehabilitation assessment plan.

Claimant asks the Appeals Board to review the findings and conclusions relating to average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

(1) The Appeals Board finds claimant sustained and is entitled to benefits for an 11 percent disability on a functional impairment basis until he lost his job with respondent in December 1992 and a 50 percent work disability thereafter.

In July of 1991 claimant injured his back in the course of his employment as a branch manager for respondent, Commercial Sound Company. The injury occurred while claimant was pulling cable through a conduit installing a food order system at a restaurant. Respondent stipulated claimant suffered an accidental injury arising out of and in the course of his employment.

Claimant initially sought medical treatment through a chiropractor, Dr. Beverly A. Amyotte, who treated claimant through December 1991. Respondent then authorized treatment by Dr. Michael J. Schmidt, an orthopedic physician. Dr. Schmidt first saw claimant January 20, 1992, and continued to treat the claimant through late July 1992. Dr. Schmidt saw claimant again in November 1993 after John J. Wertzberger, M.D., had recommended additional treatment. Finally, Dr. Schmidt provided an evaluation of claimant in April of 1994 but did not see the claimant at that time. The evaluation was based upon prior exams and a functional capacity evaluation done in March 1994.

The evidence establishes that claimant continued to work for respondent after the injury and, in fact, continued to work until respondent closed the Topeka branch of Commercial Sound on January 1, 1993. Respondent contends claimant's award should be limited to medical benefits only, citing Boucher v. Peerless Products, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. ___ (1996). In the Boucher decision, the Court

of Appeals held that a claimant was not entitled to permanent partial disability benefits if he or she was not disabled for at least one week from earning full wages. The decision states the law in effect prior to amendment in 1996 and is applicable to this case.

Claimant contends that the Boucher principles cannot be applied here because respondent did not raise this issue before the Administrative Law Judge. The Appeals Board agrees. The Boucher decision requires a factual determination: Was claimant disabled for a week from earning full wages? Factual issues not raised before the Administrative Law Judge may not be reviewed on appeal. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P. 2d 771 (1966); Irene Gutierrez v. The Boeing Company - Wichita, Docket No. 176,845 (May 1996). Respondent contends that it did raise a Boucher issue by disputing the nature and extent of claimant's disability. The Appeals Board does not consider the Boucher issue to be one of nature and extent. The Board concedes that the Boucher issue does not fit squarely within any of the typically addressed pretrial issues as identified in K.A.R. 51-3-8. However, the Board concludes from the record in this case that the Boucher issue was not raised in a manner which would put claimant on notice of its need to present evidence addressing this issue. For that reason, the Appeals Board concludes that the Boucher issue is not properly before the Board.

Respondent also contends claimant should be limited to an award of functional impairment based upon principles stated in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In that case, the Court of Appeals ruled that a claimant may not unreasonably refuse an offer of employment and thereby manipulate the system to his or her advantage. Respondent asserts claimant was offered employment at respondent's Hutchinson branch. According to respondent, claimant declined the offer and for that reason the award should be limited to functional impairment. Claimant contends that no specific offer was made. In the alternative, claimant argues that a decision to decline an offer of employment in Hutchinson, Kansas, is not factually comparable to the situation presented to the Court of Appeals in Foulk.

After reviewing the record, the Appeals Board concludes that no specific offer of employment was made. Claimant testified, and the Appeals Board finds, that respondent did discuss with claimant the possibility of moving to Hutchinson, Kansas, for employment. This discussion occurred before claimant's injury. Claimant was not specifically offered employment. As a part of that discussion, claimant advised the respondent he was not willing to accept employment in Hutchinson, Kansas. He stated that he would not be willing to move to Hutchinson, Kansas, for employment until his children completed school in the Topeka area. His children had completed school at the time the branch closed in January 1993, but the Board finds no offer was made after claimant's injury.

The Appeals Board further concludes that the circumstances presented here are not comparable to those presented in Foulk. Specifically, the Appeals Board concludes that claimant acted in good faith in attempting to find employment after the Topeka branch was

closed. The record shows that he first drew unemployment compensation benefits. He was examined by Dr. Wertzberger in the summer of 1993, and Dr. Wertzberger concluded at that time that claimant had not reached maximum medical improvement. Dr. Wertzberger considered the claimant temporarily totally disabled, and he recommended physical therapy.

Claimant sought and obtained, by preliminary hearing Order, vocational rehabilitation benefits. The vocational rehabilitation counselor, Mr. Robert A. Miller, testified that claimant would not, in his opinion, be able to return to the type of work he was doing for the respondent. He engaged in an eight-week job placement plan. He described the claimant as very cooperative working with the plan but, in the end, claimant was not successful in obtaining a job through this job search plan. The rehabilitation counselor also explored other vocational training, however, the claimant did not wish to pursue the possible options that the vocational counselor reviewed. Although respondent suggests some of the potential employment would have been at a wage comparable to claimant's pre-injury wage, the evidence shows the possible wages were $350-$400 per week, not comparable to the claimant's average weekly wage for respondent. As explained below, the Board has found claimant's pre-injury wage to be $604.24. The Appeals Board concludes that claimant did act in good faith and is not barred from recovering work disability benefits. Copeland v. Johnson Group, Inc. and Travelers Insurance Company, 24 Kan. App. 2d 306, ___ P.2d ___ (1997).

The circumstances of this case also raise an issue addressed by the Kansas Court of Appeals in Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P. 2d 294 (1997). In that case, the Court of Appeals held that if the claimant returns to an unaccommodated comparable wage job after his injury and is then laid off for economic reasons, the layoff does not trigger an entitlement to work disability. The presumption of no work disability found in K.S.A. 44-510e still applies, and the claimant's award is limited to one based upon functional impairment only.

The Appeals Board considers the facts materially distinguishable from those addressed in Watkins. Claimant returned to work following his injury, but the evidence establishes that he was not able to continue to perform the same duties he had performed at the time of the injury. Specifically, claimant testified that he was not able to do the lifting and other manual work he had done. As branch manager he was able to accommodate the injury and the work he performed was, in effect, accommodated employment.

Dr. Schmidt, claimant's treating physician, did not recommend work restrictions before claimant left work for respondent. However, he later did recommend restrictions which the Board considers attributable to the initial injury. The Board finds accommodation was necessary and for that reason the case is more nearly analogous to the facts presented in Lee v. Boeing, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). The Appeals Board therefore finds that the presumption is rebutted by the specific facts in this case, namely the significant restrictions recommended and the opinions by the vocational

experts, Mr. Monty Longacre and Mr. Gary Weimholt, regarding the effect of those restrictions on claimant's ability to obtain and retain employment in the open labor market and on his ability to earn a comparable wage.

The Appeals Board finds, however, that claimant should be limited to benefits for a functional impairment during the period from the date of his injury, July 30, 1991, to the date he lost his job, December 31, 1992. Because claimant's injury was an unscheduled injury, the disability is to be measured as specified in the following provisions of K.S.A. 1987 Supp. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. <u>There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury</u>. (Emphasis added.)

Although the record does not contain precise details, it appears claimant earned a comparable wage during this period. He remained in the same job and, although he states he did not earn as much, the record does not show exactly how much less, if any. From the evidence found in the record, the Board finds he probably or most likely earned a comparable wage.

The record contains functional impairment opinions from Drs. Schmidt, Delgado, and Wertzberger. Respondent argues the Board should rely on the opinion of Dr. Schmidt who found an 11 percent general body functional impairment. The Board agrees. Dr. Wertzberger's opinion is based, in part, on examination and findings made after claimant's condition worsened in the summer of 1994 as a result of work at Lake Perry (claimant testified he was working at Lake Perry at the time of his last visit to Dr. Wertzberger). As a result, the Board finds his opinion is not reliable as a measure of the disability from the injury at issue.

Dr. Delgado assesses a total general body impairment of 33 percent but opines that 70 percent of this 33 percent impairment preexisted. He then attributes a 10 percent general body impairment to this injury in question. The two ratings, one by Dr. Schmidt and the other by Dr. Delgado, are therefore substantially the same. The Board adopts Dr. Schmidt's 11 percent as claimant's functional impairment.

Claimant is entitled to benefits for a functional impairment of 11 percent from July 30, 1991, to December 31, 1992, the period he was employed at a comparable wage. No temporary total benefits were paid for this period and claimant is, therefore, entitled to 74.29 weeks of benefits at the rate of $42.77 per week for an 11 percent permanent partial general disability. As discussed below, the disability rate becomes a 50 percent work disability January 1, 1993.

Two vocational experts testified, Mr. Monty Longacre and Mr. Gary Weimholt. Mr. Longacre has given opinions of labor market and wage loss based upon restrictions recommended by Drs. Schmidt, Wertzberger, and Delgado. Respondent contends that the Board should rely on the evaluation by Dr. Schmidt because Dr. Schmidt's evaluation was done before claimant aggravated his injuries in the course of work done at Lake Perry subsequent to his employment for respondent.

The evidence indicates claimant did sustain some additional injury or worsening of his condition in the course of his employment at Lake Perry. Although the record contains conflicting evidence regarding the dates claimant worked at Lake Perry, the Board finds most probably claimant worked at Lake Perry in the summer of 1994. Dr. Schmidt provided his restrictions based, in significant part, on a functional capacity evaluation done on March 29, 1994. The Board finds from the record this evaluation was done shortly before claimant started his work and further finds that the functional capacity evaluation provides a reasonable basis for the restrictions. Dr. Delgado also relied on the March 1994 functional capacity evaluation. Dr. Wertzberger, on the other hand, relied in part on his findings and examination after the worsening from the work at Lake Perry. For that reason, the Appeals Board concludes it most reasonable to rely on the vocational experts' opinions which are based upon restrictions by Drs. Schmidt and Delgado.

Based upon the restrictions of Dr. Schmidt, Mr. Longacre concluded claimant sustained a 54 percent loss of access to the labor market. He also concluded that claimant sustained a 71 percent loss of access to the labor market based upon the restrictions of Dr. Delgado.

Mr. Longacre's wage loss opinions assume a pre-injury wage of $674.34. For reasons stated below, the Appeals Board has found the average weekly wage to be $604.24. Using $604.24 to compare to the projected post-injury wages (based on Dr. Schmidt's restrictions, $240 per week and based on Dr. Delgado's restrictions, $200 per week), results in a 60-67 percent loss of ability to earn a comparable wage. When equal weight is given to the opinions of Dr. Schmidt and Dr. Delgado and equal weight is given to the wage loss and labor market factors, Mr. Longacre's opinions yield a 63 percent work disability.

Mr. Weimholt, on the other hand, concluded that claimant sustained a 41 percent loss of access to the open labor market based on restrictions of Dr. Schmidt and also a 41 percent loss based upon the restrictions of Dr. Delgado. Although Mr. Weimholt initially

opined that claimant could earn a comparable wage, the opinion was based on an incorrect pre-injury wage. His opinion assumes a $400 per week post-injury wage and when asked to assume a $504 pre-injury wage, he agreed the wage ability factor would be 20%. As indicated, the Board has found the post-injury wage to be $604.24 when fringe benefits are included. The $604.24 compared to $400 per week post-injury yields a 34 percent loss of wage earning ability. When the 34 percent loss of wage earning ability and 41 percent loss of labor market are given equal weight, the result is a 37.5 percent work disability. Giving approximate equal weight to the restrictions of both Dr. Schmidt and Dr. Delgado and to the opinions of Mr. Longacre and Mr. Weimholt, the Appeals Board concludes that claimant sustained a 50 percent work disability.

(2) The Appeals Board concludes that claimant is entitled to temporary total disability benefits during the period of vocational rehabilitation.

Respondent contends that claimant is not entitled to the vocational rehabilitation benefits or the temporary total disability paid during the period of the vocational rehabilitation plan. Respondent cites K.S.A. 44-510g and argues claimant's circumstances do not meet the requirements for vocational rehabilitation. Respondent's brief quotes the statute incorrectly.

K.S.A. 44-510g actually reads:

> When as a result of an injury or occupational disease which is compensable under the workers compensation act, the employee is unable (1) to perform work for the same employer at a comparable wage with or without accommodation or (2) to enter the open labor market to perform work for which such employee has previous training, education, qualifications or experience and earn a comparable wage, such employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, and as provided in this section.

The distinction between the quote in respondent's brief and the actual statute is significant. The Appeals Board understands there to be two alternative bases for qualifying. First, the claimant may qualify by being unable to perform work at a comparable wage for the same employer. Second, claimant may qualify if he is unable to enter the open labor market and earn a comparable wage based upon his education, qualifications, or experience. In this case, the Board concludes claimant met both once the layoff occurred. This conclusion is based upon the vocational rehabilitation opinions of Mr. Weimholt and Mr. Longacre. The Board notes again that Mr. Miller believed there to be a comparable wage employment in the area, but was unable to find any such employment for claimant. In addition, the employment was at wages up to as much as

$400 per week which the Appeals Board does not consider comparable to claimant's pre-injury wage of $604.24.

(3) The Appeals Board finds that claimant's average weekly wage was $604.24 when the fringe benefits are added as of January 1, 1993, the date the Topeka branch closed, and $583.19 per week prior to that date.

The record shows that claimant earned a base pay of $1,600 per month plus commissions. The commissions averaged $213.96 per week for the 26 weeks preceding the date of accident. Claimant also was provided health insurance benefits of $91.20 per month or $21.05 per week. These amounts totalled together yield the average weekly wage of $604.24. The average weekly wage prior to the closing of the branch would not include the value of the health insurance benefits and would have been $583.19.

(4) The Appeals Board also agrees with the finding by the Administrative Law Judge that there was an underpayment of temporary total disability benefits but disagrees as to the amount. Temporary total disability benefits were paid at the rate of $246.16 per week for 42.49 weeks for a total of $10,459.34. The rate was based on an incorrect wage, the number of weeks was correct. Based on the correct wage, claimant would have been entitled to the maximum benefit. Claimant argues for a rate of $278 but, in fact, the maximum rate for accident on July 30, 1991, was $289. The underpayment was, therefore, $1,820.27.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Special Administrative Law Judge Douglas F. Martin, dated April 3, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daryl McLinn, and against the respondent, Commercial Sound Company, and its insurance carrier, Commercial Union Insurance Company, for an accidental injury which occurred July 30, 1991, and based upon an average weekly wage of $583.19 for 74.29 weeks of permanent partial disability at $42.77 or $3,177.38 for an 11% permanent partial general disability. Claimant is also entitled to 42.49 weeks of temporary total disability at $289 per week or $12,279.61 and the remaining 298.22 weeks at $201.42 or $60,067.47 based on a 50% work disability for a total award of $75,524.46.

As of October 31, 1997, there is due and owing claimant 42.49 weeks of temporary total disability compensation at the rate of $289 per week or $12,279.61, and 74.29 weeks of permanent partial compensation at the rate of $42.77 per week for an 11% general disability from July 30, 1991, through December 31, 1992, or $3,177.38, and 209.65 weeks

at $201.42 per week for a 50% work disability or $42,227.70 for a total of $57,684.69, which is ordered paid in one lump sum less amounts previously paid. The remaining balance of $17,839.77 is to be paid at $201.42 per week for 88.57 weeks, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Topeka, KS
Kip A. Kubin, Overland Park, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director